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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 173.

UNITED STATES OF AMERICA EX REL. MORRIS L. MARCUS and MORRIS L. MARCUS in his own behalf, Petitioners,

v.

WILLIAM F. HESS ET AL.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

ARGUMENT.

I.

No Special and Important Reasons for Granting Certiorari.

There are, we respectfully submit, no "special and important reasons", to use the language of Rule 38 paragraph 5 of this Court, why a certiorari should be granted in this case. The Government does not want a certiorari. The Government, appearing through its Assistant Attorney General as an *amicus curiae* in the Circuit Court of Appeals (R. 467), said that "any attempts of private individuals to recover on claims due and owing to the United States and to usurp the duties of the duly ap-

pointed officers of the United States in the collection of such claims is a matter of grave concern to the Government", and asked that the judgment of the District Court "be reversed" and "that the action be dismissed".[1] At the oral argument in the court below the learned Assistant Attorney General stated that the reason the Government had intervened was because the danger of such suits as this was proving to be an impediment to the war production program. There is, therefore, contrary to the petitioner's insinuation (p. 12), no public policy or purpose why *qui tam* suits such as this should be encouraged because of the war in which we are now engaged. The Government, through its Department of Justice, District Attorneys and other officials, is now well able to protect its domestic rights, and is inherently in a better position to judge what action should be taken to enforce its rights than a private individual, like the relator, who informed the Government of nothing, who simply paraphrased, in bringing this suit, the averments of the public indictments which had already been obtained by the regular attorneys for the United States against the respondents, and who had no personal reason or incentive for bringing this action, except the hope of enriching himself at the expense of unfortunate fellow citizens who, for the most part at least, were reluctantly forced into a practice contrary to law. Nor do we find that "The pressing need for such a remedy for this specific evil has been recently recognized in this Court" in *U. S. v. Cooper Corp.*, 312 U. S. 600, 614, as stated by petitioner (p. 24). And, as stated by the court below (R. 479, 127 F. (2d) 237), its decision does not bar recovery by the United States or the municipalities concerned of any damage actually suffered by them. The United States has a common law right to recover any

1. Petition and brief of the United States as *amicus curiae* in Circuit Court of Appeals, pp. 1, 2, 5, 15.

money of which it has been defrauded entirely independent of R. S. § 3490[2]: *Pooler v. U. S.*, 127 Fed. 519, 521. Admittedly, the municipalities can maintain suits against the respondents.

The Circuit Court of Appeals was composed of three able judges: Clark, Jones and Goodrich, JJ. The decision was unanimous. The opinion of the Circuit Court of Appeals, after certain inadvertent stenographical errors therein were corrected (R. 487), reads well, logically and convincingly. The corrected opinion appears in 127 F. (2d) 233. The opinion of the Circuit Court of Appeals in this case has already been followed by the Circuit Court of Appeals for the Fifth Circuit in the parallel case of *U. S. ex rel. Ostrager v. New Orleans Chapter, Associated General Contractors*, 127 F. (2d) 649. As will be seen from the opinion of the Circuit Court of Appeals for the Fifth Circuit in the *Ostrager* case, *supra*, it adopted the reasoning of the court below in the instant case and based its judgment dismissing that action wholly upon that reasoning, viz., that such a case as this is not authorized by R. S. § 3490 because the defendants did not have any claim against the United States, which is a necessary ingredient of liability under the statute.

There is no conflict among any of the lower federal courts upon any question involved. All of the decisions are in accord with the decision which this Court is asked to review:

U. S. ex rel. Ostrager v. New Orleans Chapter, Associated General Contractors, 127 F. (2d) 349 (C. C. A. 5);

U. S. ex rel. Olson v. Mellon, 4 F. Supp. 947, affirmed *sub nomine U. S. ex rel. Knight v.*

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2. This section and the other statutes pertinent to this case are in the record (R. 407-419).

Mellon, 71 F. (2d) 1021 (C. C. A. 3) cer. den. 293 U. S. 615;

U. S. ex rel. v. Mercur Corp., 13 F. Supp. 742, affirmed 83 F. (2d) 178 (C. C. A. 2) cer. den. 299 U. S. 576;

U. S. ex rel. v. Salant, 41 F. Supp. 196 (D. C. N. Y.);

U. S. v. Shapleigh, 54 Fed. 126 (C. C. A. 8);

Mandel v. Cooper Corp., 42 F. Supp. 317 (D. C. N. Y.);

U. S. ex rel. Brensilber v. Bausch & Lomb Optical Co. et al. (unreported) (D. C. N. Y., Civ. No. 17-11, decided January 16, 1942);

U. S. ex rel. v. Kansas Pacific Ry. Co., 26 Fed. Cas. No. 15,506 (D. C. Kan.);

U. S. ex rel. v. American Cotton Cooperative Ass'n. (unreported) (D. C. N. Y., L 58-272, decided May 20, 1935);

U. S. ex rel. v. McMurtry, 5 F. Supp. 515 (D. C. Ky.);

Mookini v. U. S., 95 F. (2d) 960 (C. C. A. 9);

Salas v. U. S., 234 Fed. 842 (C. C. A. 2);

Capone v. U. S., 51 F. (2d) 609 (C. C. A. 7) cer. den. 284 U. S. 669.

The petitioner says (p. 14) that the decision below "is in conflict with decisions of the circuit courts of appeals for other circuits", citing *Madden v. U. S.,* 80 F. (2d) 672; *Langer v. U. S.,* 76 F. (2d) 817; and *U. S. v. Harding,* 81 F. (2d) 563. In *none* of those cases, nor any other case cited by petitioner, was a recovery sustained under R. S. § 3490, the informer statute on which the case at bar is expressly based (R. 5). Indeed, *none* of said three cases cited by petitioner even involved R. S. § 3490 or the incorporated § 5438 and there is no conflict

between those cases and the decision of the Circuit Court of Appeals in the instant case. The cases cited by petitioner were not informer actions, but purely criminal prosecutions based upon statutory provisions which cannot be invoked to maintain the present case. Thus, *Madden v. U. S., supra,* was a prosecution under § 28 of the Criminal Code (18 USCA § 72). The essence of the crime defined by § 28 of the Criminal Code is forgery. Section 28 of the Criminal Code, of course, is not incorporated into R. S. § 3490. In *Langer v. U. S., supra,* the appellants were convicted under § 37 of the Criminal Code, but on appeal the judgment was reversed because the only employees assessed were those of the State and not of the Federal Government or any of the latter's agencies, and, therefore, there was no violation of any federal statute. What the petitioner quotes from this case is, therefore, dictum. More important than that, however, is the fact that this decision is based wholly on § 37 of the Criminal Code, which makes a crime of any conspiracy to obstruct the administration of any federal statute or governmental function, regardless of whether the Federal Government has sustained any pecuniary loss (see 76 F. (2d) p. 824). Section 37 of the Criminal Code is not incorporated into R. S. § 3490 and cannot support the present action. *U. S. v. Harding, supra,* also involved an indictment under § 37 of the Criminal Code (18 USCA § 88), the general conspiracy provision. The indictment was held to charge an offense because the defendants had allegedly conspired to hinder the United States "in its rights, operations and functions" (see 81 F. (2d) p. 567). This decision is based wholly on § 37 of the Criminal Code which, as above stated, makes a crime of any conspiracy to obstruct the administration of any federal statute or governmental function, regardless of whether the Federal Government has sustained any pecuniary loss. Section 37 of the Criminal Code is not incorporated into R. S. § 3490, upon

which the case at bar is expressly based, and cannot, therefore, support the case at bar. The cases cited by petitioner are distinguished by the court below in its opinion (R. 478, 127 F. (2d) 236). The petitioner's statement (p. 17) that "The holding of the court below presents a conflict with these decisions", referring to the ones cited in this paragraph, is, therefore, clearly in error. The decisions in cases involving R. S. § 3490 and the incorporated provisions of R. S. § 5438 are all in accord.

This Court has refused to grant a certiorari in every case under R. S. § 3490 which it has heretofore been asked to review: *U. S. ex rel. Knight v. Mellon*, 293 U. S. 615; *U. S. ex rel. Kessler v. Mercur Corp.*, 299 U. S. 576. There is no good reason, we respectfully submit, why any different policy should be applied to the so-called informer who is the present petitioner.

II.

No Statutory Authorization for This Suit.

1. *Informers are not favored.*

In addition to the cases cited by the court below for the rule that *qui tam* actions are regarded with disfavor, Mr. Justice Brewer, when a Circuit Judge, said of an informer who brought a *qui tam* action in *Taft v. Stephens Lith. & Eng. Co.*, 38 Fed. 28, 29:

> "Plaintiff is not suing for the value of his services, or for injury to his property, but simply to make profit to himself out of the wrongs of others; and when a man comes in as an informer, and in that attitude alone asks to have a half million dollars put into his pocket, the courts will never strain a point to make his labors light, or his recovery easy."

2. *R. S. § 3490 is to be construed strictly.*

R. S. § 3490[3] is penal in nature and must, therefore, be strictly construed. To that effect in *Olson v. Mellon, supra,* Judge Gibson, whose opinion was adopted by the Circuit Court of Appeals and a certiorari refused by this Court, said (p. 949):

> "Counsel for the plaintiffs have contended that sections 3490, 3491, Rev. St., are remedial statutes, and, as such, are entitled to a quite liberal construction, as opposed to the strict construction to be given a penal statute. With this contention we are unable to agree. *The statute is plainly penal in its nature, and is not to be enlarged by implication;* and, unless it be so enlarged, no statutory authority exists for plaintiffs' suits." (Italics added)

In *U. S. ex rel. v. Kansas Pacific Ry. Co., supra,* the court said of R. S. § 3490 (p. 680):

> "The law under which this suit is brought being a penal statute, it should not be enlarged by implication, but should be strictly construed."

To the same effect are *U. S. v. Shapleigh,* 54 Fed. 126, 129-130, 134; *Pooler v. U. S.,* 127 Fed. 519, 521; *Ferrett v. Atwill,* 8 Fed. Cas. No. 4,747, p. 1163; and others.

3. *R. S. § 5438 applies only to false claims "upon or against the Government of the United States, or any department or officer thereof" made or presented by the defendant, alone or jointly with others.*

That the provisions of R. S. § 5438, incorporated into R. S. § 3490, apply only to cases in which the defendant has made or presented a false, fictitious or fraudulent claim upon or against the Government of the

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3. This section is printed in the record (R. 407).

United States or a department or officer thereof, based on the Government's own liability to the claimant, was conceded by the relator in the courts below[4] and is the construction which has been uniformly placed upon this informer statute in every case in which it has been considered, without any exception whatever. Thus, in *U. S. ex rel. v. Mercur Corp.*, 13 F. Supp. 742, the Honorable Robert P. Patterson, then a District Judge of the Southern District of New York, afterwards a Circuit Judge and now Assistant Secretary of War, in dismissing an informer's complaint based on R. S. § 3490 because the suit was not within the purview of that section and the incorporated provisions of R. S. § 5438, said (p. 743):

> "An informer's action will therefore lie *only* in cases where the defendant has made false, fictitious, or fraudulent 'claim upon or against' the Government of the United States. This means a claim for money or property 'to which a right is asserted against the Government, based upon the Government's own liability to the claimant.' United States v. Cohn, 270 U. S. 339 . . ." (Italics added)

The Circuit Court of Appeals for the Second Circuit affirmed: 83 F. (2d) 178. The Circuit Court, by Judge Augustus Hand, said (p. 181):

> "The question before us is whether the amended complaint and the lease and agreements which it incorporates show that the defendants, or any of them, were guilty of presenting a false claim against

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4. Thus in the "Brief for Appellees" filed by relator in the court below the heading of the portion of his brief dealing with the meaning and scope of the informer's act was as follows (p. 21): "The Informer's Act Applies to the Making of False Claims Against the United States Government or any Department or Officer, as Well as Against the Property of the Government or any Department Thereof." Relator below made no attempt to construe the statute differently. His reference to a claim against the property of the Government was based on *U. S. ex rel. Kessler v. Mercur Corp., supra*, and is answered in this brief at p. 14.

the United States for the purpose of obtaining payment or approval thereof. . . .

In order to bring a case within the statute we have referred to, it is necessary to show that a claim is presented against the United States, or in rem against its property. This interpretation of the statute is so entirely settled as to be beyond any question."

This Court denied a certiorari: 299 U. S. 576.

In *Olson v. Mellon*, 4 F. Supp. 947, which was also an informer's action based on R. S. § 3490, Judge Gibson in holding that the case was not authorized by the statute said (p. 948):

"It will be noted that section 5438, R. S., related only to *false claims against the United States*, and was not wide enough, in its original form, to include the suppression of material matters in an income tax return." (Italics added)

The Circuit Court of Appeals affirmed on Judge Gibson's opinion: *U. S. ex rel. Knight v. Mellon*, 71 F. (2d) 1021. This Court denied a certiorari: 293 U. S. 615.

Other cases to the same effect are *U. S. ex rel. v. Salant*, 41 F. Supp. 196, 197; *U. S. ex rel. v. McMurtry*, 5 F. Supp. 515; *U. S. ex rel. v. American Cotton Cooperative Ass'n.* (L 58-272, U. S. D. C., S. D. N. Y.)[5]; *U. S. v.*

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5. This is an unreported case brought under R. S. § 3490, charging that large sums which had been paid to the Cotton Stabilization Corporation and the Grain Stabilization Corporation by the Federal Farm Board out of the revolving fund provided by Congress in the Agricultural Marketing Act were fraudulently obtained by the defendants through various conspiracies, misrepresentations, concealments, falsifications of bills, invoices, warehouse receipts and book entries and the like. The action was dismissed because not authorized by the informer's act. The opinion in that case was written by Judge Knox, now Senior District Judge of the Southern District of New York. A copy of Judge Knox's opinion is in the record (R. 432-433).

Cohn, 270 U. S. 339, 345-346; *Mookini v. U. S.*, 95 F. (2d) 960, 961; *Salas v. U. S.*, 234 Fed. 842; and *Capone v. U. S.*, 51 F. (2d) 609, 614.

The uniform construction placed upon the provisions of R. S. § 5438, which are incorporated into R. S. § 3490, confining it to cases in which the defendant, either alone or jointly with others, has made or presented a false claim against the United States Government, based upon the Government's own liability to the claimant, is right, particularly in view of the strict construction to which this informer's act is subject. Each clause of R. S. § 5438, except those at the end relating to misappropriation of military property, makes a criminal offense of certain acts when done in conjunction with the presentation of a false claim against the Government of the United States or any department or officer thereof. Thus the first clause specifies a false, fictitious or fraudulent "claim upon or against the Government of the United States, or any department or officer thereof." The second clause does the same, by the words "such claim", and the third and last clause also clearly means a false claim upon or against the Government of the United States or a department or officer thereof, for the offense is conspiracy to defraud "the Government of the United States, or any department or officer thereof" by obtaining the payment or allowance of a false claim. The gravamen of the third clause was not any conspiracy to defraud the United States by any false claim against anyone, as contended by petitioner (petitioner says [p. 23]: "The third clause of R. S., sec. 5438, is directed at any form of joint action 'to defraud the Government of the United States.'") for that was the substance of another section of the Revised Statutes, § 5440, now § 37 of the Criminal Code (18 USCA § 88)—the general conspiracy section under which the respondents were indicted, pleaded *nolo contendere* and were fined (R. 294-300). Here again the petitioner seeks to

interpret the statute liberally, when as shown by the cases heretofore cited (pp. 6-7) the act is to be strictly construed against an informer. The purpose and intent of the third clause, it is submitted, was to make a crime of a combination or conspiracy by two or more to do what was made a crime by the preceding two clauses when done by a single individual, viz., the making of a false claim, as the context shows, against the United States or any department or officer thereof. The plain language of R. S. § 5438, therefore, precludes its application to a false or fraudulent claim upon or against a local municipality, like a county, city or borough of one of the states.

It being, therefore, established by all of the cases, and it also appearing from consideration of the statutory language and history, that in order to be liable under R. S. § 3490 the defendant must have made a false *claim against the Government of the United States or some department or officer thereof,* it remains only to apply that law to the facts of the case at bar. The defendants had no contract with the Government of the United States, nor with any department or officer thereof. Neither the Government of the United States nor any department or officer thereof promised to pay the defendants anything for their electrical work. How then could the defendants have "any claim upon or against the Government of the United States, or any department or officer thereof"?

It is not sufficient under the provisions of R. S. § 5438, which are incorporated into R. S. § 3490, that the defendants make or present claims for payment or approval to an officer in the civil, military or naval service of the United States, knowing such claims to be false, fictitious or fraudulent, *unless also those claims are "upon or against the Government of the United States, or any department or officer there-*

of." In the case at bar, the only claims which the defendants had and, therefore, could present, were against the local municipalities, which alone had promised or contracted to pay them (R. 274). That the contracts with the defendant electrical contractors were simply two-party contracts between the local municipality, as one party, and the electrical contractor, as the other party, and that neither the United States of America nor any of its departments, officers or agencies was a party to said contracts, clearly appears from those contracts and is beyond dispute (R. 274). The contracts are signed only by the electrical contractor and officers of the local municipality (R. 276). Incidentally, it may also be noted that the advertisement for bids was solely by the local municipality (R. 217-218), the bids were addressed exclusively to the local municipality (R. 225) and the performance bonds run alone to the local municipality (R. 277, 279). Everything is consistent with the whole liability for paying the contractor being solely on the local municipality.

Consequently it is immaterial that the I-23 forms *i. e.*, the periodical estimates for partial and final payment, were presented to and approved by a PWA resident engineer inspector before they were paid.[6] Nor is it material that the PWA approved the plans and specifications, contracts, changes and the like, exercised

6. Each payment to every contractor was made by the local municipality which had contracted with him, by check or draft signed solely by officials of the local municipality, drawn on bank accounts in the name of the municipality and subject to check only by officials of the local municipality and not by the PWA or any officer of it (R. 44, 45-46, 57-58, 60-68, 70, 74, 76, 81, 85, 89-90, 95-98, 100-101, 103-104, 106-108, 114). The local municipality could, if it wished, pay the contractor the full amount of the periodical estimate for the work done during the previous month, notwithstanding some qualification or exception to the certification of the PWA inspector thereon (R. 62), and sometimes in fact actually did pay the contractor the full amount of the periodical estimate, notwithstanding that the PWA inspector had excepted one or

some watch over the construction of the improvements, audited the accounts relating to payment for the projects or did any of the other things which the relator has mentioned, because none of those acts resulted in giving the defendants "any claim upon or against the Government of the United States, or any department or officer thereof."

Assuming that there was no fraud whatever in the transaction, if one of the defendants who has not been paid in full, of whom there are several, sued the Government of the United States, or any department or officer thereof, for the balance of his contract price, would any court permit a recovery? Unless that question can be answered in the affirmative, notwithstanding that only the local municipalities ever contracted to pay the defendants, the case at bar is not authorized by R. S. § 3490 and the judgment of the Circuit Court is right.

What is meant by a claim against the United States was clearly defined by this Court in *Hobbs v. McLean*, 117 U. S. 567, 575, as follows:

> ". . . there was no claim against the United States to be transferred. Peck had at that time no contract even with the United States, and there was no certainty that he would have one. What is a claim against the United States is well understood. *It is a right to demand money from the United States.* Peck acquired no claim in any sense, until

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more items thereon from his certification (R. 101, 108-109). An instance of this kind is shown by the periodical estimate (I-23 form) which is included in the record (R. 202-207) and the warrant or draft of the West View School District in payment of that periodical estimate (R. 208, both parts of Ex. 245). Under the heading "Remarks" at the end of this periodical estimate, it will be seen that the PWA inspector expressly excepted one item from his certification because it entailed a change which had not been approved by the PWA (R. 207). Nevertheless, the School Board's draft was for $1,562.39, the same amount as the total shown due by said periodical estimate (R. 205, 208).

after he had made and performed, wholly or in part, his contract with the United States." (Italics added)

In the light of the foregoing language of this Court, it is clear that the defendants never had any claim against the United States or any department or officer thereof, *because they never had any contract with any of them.*

Nor did the defendants ever have any claim, *in rem* or otherwise, against the property of the United States Government. The only claim of the defendants grew out of the promise contained in their contracts with the local municipalities that the local municipalities would pay them a certain sum of money for doing the electrical work on each project (R. 274). These claims were purely against the local municipalities, *in personam*. No specific dollars or fund was prescribed by the defendants' contracts for their payment. Where the local municipalities obtained the funds to pay the contractors upon performance by the latter of their part of the contracts was immaterial as between the local municipalities and the contractors. Against what property of the Federal Government could the contractors possibly have maintained a proceeding *in rem?* Not against the money received by the local municipality by way of a grant from the PWA and deposited in the "construction account" along with other funds of the local municipality, because there is no legal principle or basis to our knowledge, and none has been suggested by the relator, by which the defendants could have enforced any claim *in rem* against that fund. The claims of the defendants were simply *in personam* against the local municipalities, like any other contractual claim to collect a promised sum of money for certain services: *Kline v. Burke Construction Co.*, 260 U. S. 226, 228.

The construction placed upon the informer act, R. S. § 3490, by the Circuit Courts of Appeals for the Second, Third and Fifth Circuits and by the other courts in the cases cited by us does not emasculate or nullify the statute, as contended by petitioner. The statute as construed by the courts applies to any person who, either singly or in confederation with others, presents a false, fictitious or fraudulent claim upon or against the Government of the United States, or any department or officer thereof, based upon the Government's own liability to him. Thus, ample room is left for the statute to operate.

4. *No falsity in any claim.*

Even if, let us assume for the sake of argument only, the case would otherwise come within the purview of R. S. § 3490, still we submit that no "false, fictitious, or fraudulent" claim was presented for payment or approval, because the claims were strictly in accordance with the existing written contracts on the respective jobs, to receive the amounts agreed in said contracts to be paid. There is no contention that the respondents did not furnish the electrical installations on the respective jobs in full accordance with their contracts. This is not a case in which defendants, having contracts with the United States Government under which the former were to furnish services or materials to the Government, presented claims for payment or approval, falsely representing that they had furnished the services or the materials, when in fact they had not done so. Such a case would come within the purview of R. S. § 3490 and the incorporated provisions of § 5438. The illegality in the case at bar occurred in the bidding, resulting in the price agreed in the subsequent contract to be paid for the work being higher than it otherwise would have been, but there was no false or fraudulent misrepresentation in the periodical estimates for partial and final payment

nor was there any fraud or collusion in the presentment or approval of said periodical estimates (the I-23 forms). There was no falsification or fraud in anything which occurred after the contracts were executed. The municipalities received the electrical installations in accordance with their contracts, and they paid the contractors exactly what the contracts called for and no more. The claims for payment were for proportions of the agreed contract price as the work progressed, and the whole of the claims just equalled, and did not exceed, the price stipulated in the contracts to be paid. We, therefore, submit as an alternative reason why this case does not come under R. S. § 3490 and the incorporated provisions of § 5438, that the claims presented for payment or approval were not "false, fictitious, or fraudulent", as required by the statute.

This position is fully supported by the recent decisions in *Mandel v. Cooper Corp.*, 42 F. Supp. 317, and *U. S. ex rel. Brensilber v. Bausch & Lomb Optical Co. et al.*, the latter being an unreported case decided by the District Court for the Southern District of New York on January 16, 1942. Both of those cases were also informer actions brought under the same statutory provisions as the case at bar. Both cases were dismissed for failure to state a cause of action under R. S. § 3490 and the incorporated provisions of R. S. § 5438. In the *Mandel* case the complaint alleged that the defendants, which included all of the large tire companies, had defrauded the United States Government by collusive bidding to supply the rubber tire requirements of the Government and that the Government, therefore, had entered into contracts to pay, and had paid, substantially higher prices for its tire requirements than it would have in open and fair competition. Holding that the suit was not authorized by the statute in question, Judge Coxe said (p. 319):

> "The present action sounds in tort. It really is an action for damages for alleged fraudulent representations in the procurement of contracts to supply the tire requirements of the Government during the periods in question. It is not an action for damages sustained by the Government by reason of the presentation for payment or approval of fraudulent claims within the meaning of the informer statute."

The *Brensilber* case was a similar action, charging collusion in submitting bids to the United States Government for military optical instruments. No opinion was written in that case. Instead, we are advised that the court dismissed the action from the bench immediately after the argument and granted summary judgment in favor of the defendants. The court referred orally to the opinion in *Mandel v. Cooper Corp., supra.*

The statute upon which this action is predicated requires the claims which are made or presented to be false, fictitious or fraudulent. No such claims were made or presented in this case. This disposes of petitioner's arguments under the first and third clauses of R. S. § 5438.

5. *No false certificate or claim made by respondents to aid municipalities in getting PWA funds.*

In his petition for certiorari (pp. 19-22) the petitioner for the first time contends that he has a cause of action under the second clause of R. S. § 5438. His argument is that the certificates of non-collusion which sometimes accompanied the bids and the periodical estimates on the I-23 forms which the contractors submitted to the local municipalities for periodical and final payment were for the purpose of aiding to obtain the payment or approval of the requisitions of the municipali-

ties upon the United States. A question not raised below should not be considered on appeal: *Duignan v. U. S.*, 274 U. S. 195, 200. The Circuit Court decided the question whether this case was authorized by the informer's statute precisely as the question was framed and presented to it by both sides, and new contentions such as petitioner now makes under the second and third clauses of R. S. § 5438 should not constitute a basis for reviewing the decision of the court below. But aside from that principle, this novel afterthought of the petitioner is unsound.

In the first place, as shown under the previous point in this brief (pp. 15-17), the periodical estimates for partial and final payment on the I-23 forms which were submitted, usually monthly, by the contractors to the local municipalities and which were used in conjunction with the payments by the local municipalities to the contractors did *not* "contain any fraudulent or fictitious statement or entry". The second clause of R. S. § 5438 expressly requires the document involved "to contain [a] fraudulent or fictitious statement or entry" (R. 409). The periodical estimates merely showed the proportion of the contractor's work performed during the preceding month, in order that he might receive that proportion of the lump-sum price specified in the written contract previously entered into between him and the local municipality (see Ex. 245, R. 202-207). There is no evidence, and there was no contention below, that the periodical estimates for partial and final payment on the I-23 forms, also sometimes referred to by petitioner as "claims", contained "any fraudulent or fictitious statement or entry". No "fraudulent or fictitious statement or entry" in those I-23 forms is pointed out in the petition and none could be. The main document upon which the petitioner relies for his contention now under examination, therefore, clearly fails to fulfill the statutory

requirement and may be eliminated from further consideration.

As for the certificates or affidavits of non-collusion which sometimes, but not always[7], accompanied the bids to the local municipalities, no such certificates or affidavits were required by the contract between the PWA and the local municipality (Ex. 22 and 76, R. 157-184), or by any regulation or law; when required by the local municipality they were, in many instances at least, kept by the local municipality and not shown to the PWA (R. 49, 51-52); when a copy of them was included in the contract documents which were submitted to the PWA for approval, the PWA's approval did *not* apply to the certificate or affidavit of non-collusion, because the approval of the PWA was limited to the contract being in conformity with the agreement between the applicant (i. e., municipality) and the United States (R. 217), which latter agreement did *not* require any certificate or affidavit of non-collusion in bidding but was largely devoted to requirements regarding the hiring and compensation of labor (Ex. 22 and 76, R. 157-184); the certificates and affidavits accompanied the *bids* and were *not* "for the purpose of obtaining or aiding to obtain the payment or approval of [any] claim" upon or against the Government of the United States or any department or officer thereof, as expressly required by the second clause of R. S. § 5438; and there is *no evidence* whatever that the certificates or affidavits of non-collusion in bidding influenced or motivated the PWA in paying its agreed grant to the local municipalities in the four installments as the work progressed as provided in the

7. Relator in his petition (p. 7) says that there were statements or certificates of non-collusive bidding on all projects involved herein, with the exception of the Pittsburgh Municipal Airport Project. That is not correct. Reference to Ex. 626 will prove that there was no such statement or certificate on the North Park Bath House Project. Others could be added.

contract between the PWA and the local municipalities (Ex. 22, R. 160-163). In those instances in which no certificates or affidavits of non-collusion in bidding existed, it is obvious that the PWA could *not* have been influenced or motivated by any such certificates or affidavits in paying to the local municipalities the funds which it had promised the local municipalities to assist them in constructing those projects.

The relator says in his petition (p. 20) that "The evidence further showed that they were included in the Government audit and relied upon by the administrative officers of the Government in acting upon the municipalities' requisitions of federal funds to be placed in the Construction Account." No record reference to any supporting evidence is given by the petitioner. If the pronoun "they" in the sentence quoted from the petition is intended to include the certificates of non-collusive bidding, the petitioner's statement is positively wrong and contrary to fact. There is absolutely no evidence that those certificates were included in the Government audit or that they were relied upon by the administrative officers of the Government in acting upon the municipalities' requisitions of federal funds to be placed in the construction account. It would have been physically impossible for any such certificates to have been included in any Government audit or relied upon by any administrative officers of the Government in acting upon any requisitions by municipalities of federal funds in the instances in which no such certificates were made or existed, and yet the construction account was audited and the municipalities' requisitions honored in those instances just the same as in the cases where such certificates accompanied the contractors' bids. Moreover, one-third of the PWA grant, known as the "Advance Grant", could be, and usually was, paid to the municipality before bids were even solicited from the contractors (Ex. 22, R. 160).

Also contrary to petitioner's statement, in the last paragraph of his footnote No. 5 (p. 10), it does not follow from the fact that the PWA suspended payment of part of its grants to the local municipalities, when its investigators discovered the illegal bidding by the electrical industry in Pittsburgh, that the certificates of non-collusion which sometimes accompanied the bids were "a material part of the documents considered in passing on the question of payment by the United States under the grant in each case." The suspension of payments by the Government resulted wholly from the Government's discovery that the bidding had been collusive, which would be true or not regardless of whether a certificate of non-collusive bidding had accompanied the bids on any given project or not. There is no evidence or intimation anywhere that the PWA's suspension of payments to the local municipalities was in any way due to any certificates of non-collusive bidding and the PWA would doubtless have suspended grant payments exactly as it did upon discovery of the illegal bidding even if no non-collusion certificate or affidavit had ever existed. Indeed, the explanation by the PWA for its suspension of grant payments, referred to by petitioner in said footnote, supports the position of the respondents, because it was that a certain amount had been suspended "pending action by the Owner regarding collusive bidding on [the electrical] contract" (R. 215), the term "Owner" referring to the local municipality (R. 49-51). Similar explanations will be found with reference to suspended portions of grants on other projects (R. 47-48, and see Ex. 150, R. 195). The Government thereby indicated its opinion to be, as the respondents contend, that the right of action against the electrical contractors is in the local municipalities.

The second clause of R. S. § 5438 specifically requires that the document in question must have been made by the defendant "for the purpose of obtaining or

aiding to obtain the payment or approval of such claim", meaning as conceded in the petition for certiorari (pp. 11-12) a claim "upon or against the Government of the United States." The certificates or affidavits of non-collusion in bidding did not exist as to all projects, and even where they did exist were *not* made, or used, for the purpose of aiding the municipalities to obtain from the United States Government what the latter had already agreed to grant the municipalities. Consequently, the only other document relied upon by the petitioner to make out a cause of action under the second clause of R. S. § 5438 also fails to satisfy the statutory qualifications, particularly when they are strictly construed as they should be.

Furthermore, it is respectfully submitted that the claim against the United States Government, in order to come within the purview of the informer's act, must be "false, fictitious or fraudulent." The claims of the local municipalities against the United States Government certainly could not be described as "false, fictitious or fraudulent." They contained no false, fictitious or fraudulent statement. Each was in strict accord with the pre-existing written contract between the local municipality and the United States. None called for any more than the amount which the United States had agreed in said preexisting contract to give the municipality to assist it in financing what it cost the municipality to construct the project. For the alternative reason stated in this paragraph, therefore, it is also respectfully submitted that the relator made out no case under the second clause of R. S. § 5438.

U. S. v. Coggin, 3 Fed. 492 and *U. S. v. Strobach*, 48 Fed. 902, cited by petitioner on the point under consideration, both were criminal cases in which the defendant personally had presented a fraudulent claim directly against the United States Government, for payment di-

rectly out of the United States Treasury, and each claim was based on the Government's own alleged liability to the claimant. Those cases, therefore, will not support the present action.

6. *Right of action is in local municipalities.*

Entirely aside from and independent of the informers act, it is well settled that a donor who gives money to a donee, either for a specific purpose or otherwise, has no cause of action against a third party who defrauds the donee out of some of the money. There is no privity of contract between the donor and the third party. The right of action in such a case is solely in the donee. Some cases in support of this proposition are *Cooper v. Roberts,* 59 U. S. 173; *Alabama v. Schmidt,* 232 U. S. 168; *Church v. Swetland,* 243 Fed. 289; *George v. Thompson,* 285 Fed. 902; *Plews v. Burrage,* 19 F. (2d) 412; *China Fire Ins. Co. v. Davis,* 50 F. (2d) 389; and *Myers v. Centers,* 171 Ark. 1005, 287 S. W. 189.

In this connection the terms of the offers from the PWA to the local municipalities should be noted. The gist of them is that the Government "offers to aid in financing the construction of" a specified improvement *"by making a grant to" the local municipality* (see Ex. 76, R. 179). The noun "grant" is defined in *Webster's New International Dictionary* (1939) as the "Act of granting" or as the "Thing or property granted; gift; boon". The verb "grant" is defined as follows:

> "To bestow or confer, with or without compensation, particularly in answer to prayer or request; to give.
>
> . . . . . .
>
> To give or bestow formally, usually in answer to a petition, as a privilege; to make conveyance of; to give the possession or title of, esp. by a deed or formal writing; to convey."

The following are extracts from statements by the court and relator's counsel during the trial (R. 45-46):

"*The Court*: . . . The grant of the Government was to the School District and not to anyone else."

(R. 46):

"*The Court*: . . . I do not see how any conclusion can be drawn from that, from what the witness has said in answer to the question propounded by Mr. Margiotti, that the money was paid to the electrical contractor by the Government, when as a matter of fact under all the evidence the grant was made to the School Board, who contracted with the contractors and raised that much money from the Government to apply on the contract. That is all I see in it.

Mr. Margiotti: That is correct."

The checks for the PWA grants were payable to the local municipality, were sent to the local municipality, and were deposited by the treasurer or other official of the local municipality in a bank account in the name of the municipality and subject to withdrawal only by the municipality (R. 66-67, 74-76).

7. *Errata.*

Footnote No. 4 in the petition for certiorari (p. 8) appears to us misleading because it says that the I-23 forms "called special attention to the fact that claims against the United States were involved, by citing federal statutes punishing presentation of false claims against the United States (R. 190, 191; 202, 204)." The first statutory provision quoted on the I-23 form is § 9 of the Emergency Relief Appropriation Act of 1935 (c. 48, 49 Stat. 115, 118, R. 191, 204). This section clearly makes a crime of many acts not requiring claims against the United States. The other statutory provision quoted

is § 35 of the Criminal Code of 1909 (c. 321, 35 Stat. 1095, as amended by the Act of October 23, 1918, c. 194, 40 Stat. 1015 and by the Act of 1934, c. 587, 48 Stat. 996, R. 191, 204). The 1934 amendment to § 35 of the Criminal Code extended it to any misrepresentation "in any matter within the jurisdiction of any department or agency of the United States", thereby making a claim against the United States unnecessary. Neither § 9 of the Emergency Relief Appropriation Act of 1935 nor § 35 of the Criminal Code, nor any amendments of the latter, is incorporated into R. S. § 3490, the informer's statute upon which the case at bar is predicated: *Olson v. Mellon, supra; U. S. v. Mercur Corp., supra; U. S. v. McMurtry, supra.*

There are also factual inaccuracies in the excerpt quoted in the petition for certiorari (p. 10) from the opinion of the District Judge. In the first place, the estimates on form I-23 were *not* submitted by the contractor to the Administrator. They were submitted by the contractor to the architect, engineer or other representative of the local municipality, and the latter, after he had approved the estimates, submitted them to the PWA inspector, who after making his notations thereon returned the estimates to the local municipality (R. 118-120). In the second place, payments could be and were made from the construction account without the approval of the Administrator, either on the I-23 forms or elsewhere (R. 62, 101, 108-109 and see Ex. 245, R. 205, 207, 208). Nor was the bank in which said account was placed approved by the Administrator; the only requirement in this respect was that contained in PWA Form 230, Part II, paragraph 5, which specified that the construction account shall be kept in a bank which is a member of the Federal Deposit Insurance Corporation (Ex. 22, R. 163).

III.

Defendants Are Being Punished Twice.

There are also other reasons, it is respectfully submitted, why the decision of the Circuit Court of Appeals is correct. These other reasons were presented by us in the courts below, but it was not necessary for the Circuit Court to mention them, one reason being sufficient for its decision.

The respondents have already been punished by fines in criminal proceedings for the same acts upon which the case at bar is founded (R. 294-329). Penalties and double damages are sought to be recovered, and are included in the verdict in the present action (R. 338). To subject the respondents to penalties, forfeitures or double damages for the same offenses for which they have already been criminally punished violates the Fifth Amendment to the United States Constitution and is contrary to the law as declared in *U. S. v. Chouteau*, 102 U. S. 603, 611-612; *Coffey v. U. S.*, 116 U. S. 436, 443; *U. S. v. LaFranca*, 282 U. S. 568, 572, 573-574, 575; *U. S. v. Gates*, 25 Fed. Cas. 1263, 1266, 1267; *U. S. v. McKee*, 26 Fed. Cas. 1116, 1117; *U. S. v. One Distillery*, 43 Fed. 846, 853; *U. S. v. Shapleigh*, 54 Fed. 126, 134; *U. S. v. Jun*, 48 F. (2d) 593, 594; and *U. S. v. Glidden Co.*, 78 F. (2d) 639, 642-643 (cer. den. 296 U. S. 652).

The averments of the complaint (R. 5-32) in the case at bar are in most respects literally, and in all respects substantially, the same as the averments of the indictments (R. 301-329). The projects upon which damages are claimed in the instant suit are all included in the first indictment, the one at No. 10,462 Criminal—indeed, they are listed in the same order in both. That the issues in the present case are the same as those at No. 10,462 Criminal was stated by relator's counsel when

he offered the record at No. 10,462 Criminal in evidence during the trial of the instant case (R. 117-118).

The $2,000 penalty which the informer's act, R. S. § 3490 (R. 407), provides that the defendant "shall forfeit and pay", in addition to double damages, is clearly penal in character and constitutes a penal sanction.

In *U. S. ex rel. Ostrager v. New Orleans Chapter, Associated General Contractors; supra,* the District Court based its dismissal of the complaint on this ground, *i. e.,* that the informer's action under R. S. § 3490 was barred because it was an attempt to punish the defendants a second time, they already having been indicted and fined for the same acts, just as in the case at bar. The District Court's opinion in that case is not reported but is referred to in the opinion of the Circuit Court of Appeals for the Fifth Circuit (see 127 F. (2d) p. 650).

IV.

Official Consent Needed.

The necessary authorization or sanction by government officials for the institution and prosecution of this suit has not been obtained or shown. The relator has not shown that he obtained the authorization or sanction of the Commissioner of Internal Revenue, of the Attorney General or of any other government official, and in fact he has not obtained any such approval. We submit that the authorization or sanction of the Commissioner of Internal Revenue and of the Attorney General is a condition precedent to the bringing and maintaining of such a suit as this.

R. S. § 3214 reads as follows:

"No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner of Internal Revenue author-

> izes or sanctions the proceedings: *Provided,* That in case of any suit for penalties or forfeitures brought upon information received from any person, other than a collector or deputy collector, the United States shall not be subject to any costs of suit."

R. S. § 3214 should not be limited, we submit, to suits involving taxes. The section was expressly extended by Congress to cover as well any suit for the recovery "of any fine, penalty or forfeiture." A forfeiture is sought to be recovered in the instant suit and accounts for $112,000 of the verdict. The $2,000 item is specifically described as a "forfeiture" by Congress in the informer's act upon which this suit is brought (R. S. §§ 3490, 3492 and 3493).[8] R. S. § 3214, therefore, by its express terms applies to the case at bar.

Following Executive Order No. 6166, issued by the President, the Act of February 10, 1939, c. 2, 53 Stat. 1, 460 (26 USCA § 3740) provides as follows:

> "No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced."

The approval of the Attorney General is now, therefore, also required for such a suit as this. Since his approval has not been shown, the suit cannot be maintained.

There are sound reasons of public policy why the approval of the Commissioner of Internal Revenue and of the Attorney General should be required to the bringing of such a suit as this, but it is not necessary to delve into them.

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8. These sections appear in the record (R. 407-408).

V.

Conclusion.

The opinion of the Circuit Court of Appeals in this case is so completely in accord with every other case in point, including the recent decision by the Circuit Court of Appeals for the Fifth Circuit in *U. S. ex rel. Ostrager v. New Orleans Chapter, Associated General Contractors, supra*, the decision is so clearly right for the reasons presented in this brief, and the absence of any special and important reason for reviewing the decision is so apparent, that it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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